United States Court of Appeals

for the Second Circuit

APPENDIX

RIGINAL

74-1728

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United States Court of Appeals

For the Second Circuit.

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DiGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, INC.,

Defendants and Third-Party Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

APPENDIX.

LARKIN, WRENN AND CUMISKY,
Attorneys for Defendants and Third-Party Plaintiffs-Appellants,
11 Park Place,
New York, N. Y. 10007

DAVID G. TRAGER,
U. S. Attorney, Eastern District of New York, Attorney for Third-Party Defendant-Appellee,
225 Cadman Plaza East,
Brooklyn, N. Y. 11201

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

(3940)

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PAGINATION AS IN ORIGINAL COPY

Index to Appendix.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DIGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, Inc.,

Defendants and Third-Party Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA,

Third-Party Defendant.

Relevant Docket Entries.

1- 2-73	Petition for removal filed.
1-11-73	Defts' affidavit in opposition to the petition for removal and memorandum of law in support filed.
2-22-73	By Travia, J.—Order dtd 2-21-73 removing action from Sup. Ct. Kings County & that case shall be tried by a jury, etc filed.
4- 2-73	Answer of U.S.A. to third-party complaint filed.
6-15-73	Before Travia, J.—Case called on motion for an order re-settling the order so as to provide, etc. Motion granted. Consent order to be submitted.
8- 3-73	Notice of motion and memorandum of law to amend answer of U.S.A. ret 9-14-73 filed.
8-31-73	Affidavit of John Wrenn filed.

Relevant Docket Entries

11- 9-73	Notice of motion ret. 12-14-73 for an order for leave of third party USA to amend its answer, etc. & memo of law in support of motion filed.
11- 9-73	General Rule 9 (g) statement filed.
11- 9-73	Amended third-party deft answer filed.
1-10-74	Affidavit of John J. Wrenn filed.
1-11-74	Before Travia, J.—Case called. Dismissed as to Robert Sheridan, 3rd party deft. Motion for leave of govt to file amended answer granted. Partial summary judgment denied. Submit order on notice.
1-18-74	By Travia, J.—Order dtd 1-18-74 dismissing the third party action, giving leave to the U.S.A. to serve an amended third party answer, and that the motion of the U.S.A. for partial summary judgment is denied filed. (p/c mailed to attys.)
1-28-74	Amended third-party deft answer filed.
2- 5-74	Notice of motion and memorandum of law to dismiss third-party action, ret 3-8-74 at 10 AM. filed.
2- 6-74	Notice of motion and memo of law on behalf of defts and third party pltff, ret. 2-28-74 filed.
3-27-74	By Travia, J.—Decision and order dtd 3-26-74 denying third-party pltffs' application for partial summary judgment, and granting third-party deft's application dismissing third-party complaint filed.
4-25-74	Notice of Motion, ret. 4/19/74 filed *re*: amending the Decision and Order of J. Travia dated 3/26/74.
4-25-74	By Travia, J.—Order dtd 4/27/74, under Rule 54 (b) that a final judgment be entered filed.
4-26-74	Judgment dtd 4-26-74 dismissing third-party action filed.
5- 7-74	Notice of appeal filed. Duplicate of appeal & docket entries mailed to C of A. jn

Complaint.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DIGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, Inc.,

Defendants.

Plaintiff, as and for his Complaint herein, respectfully alleges:

1. Defendant Gaspare DiGiorgio is a resident of the State of New York, County of Kings.

2. That Defendant, L P I Transport Corp., is a corporation doing business in the State of New York.

3. That Defendant, Pepsi-Cola, Inc., is a corporation doing business in the State of New York.

4. That on December 22, 1971, and for some time prior thereto, the Van Dam Exit of the eastbound lanes of the Long Island Expressway in the County of Queens was a public highway in the State of New York.

5. That on December 22, 1971, defendant L P I Transport Corp. was the owner of a certain Mack truck with a Registration No. 94151, 1972; New York.

6. That on December 22, 1971, at approximately 11 a. m. on the Van Dam Exit of the eastbound lanes of the Long Island Expressway, plaintiff was a passenger in a certain Rambler motor vehicle, Registration No. GF1144601, District of Columbia.

7. That the vehicle described in Paragraph No. 6 was owned by the United States Government.

8. That at the time and place described in Paragraph No. 6, the vehicle described in Paragraph No. 5 was being operated by Gaspare DiGiorgio with the expressed or implied consent of defendant L P I Transportation Corp.

9. That at the time and place described in Paragraph No. 6, the vehicle described in Paragraph No. 5 was being operated by defendant, Gaspare DiGiorgio, with the expressed or implied consent of defendant, Pepsi-Cola, Inc.

10. That at the time and place described in Paragraph No. 6, the vehicle described in Paragraph No. 5, was being operated in the business of defendant, L P I Transport Corp.

11. That at the time and place described in Paragraph No. 6, the vehicle described in Paragraph No. 5 was being operated in the business of defendant, Pepsi-Cola, Inc.

12. That at the time and place described in Paragraph No. 6, the vehicle described in Paragraph No. 6 and the vehicle described in Paragraph No. 5 were in contact with each other.

13. That the aforesaid contact between the vehicle described in Paragraph No. 6 and the vehicle described in Paragraph No. 5 was caused solely by the negligence of defendants in the ownership, operation, maintenance and control of the motor vehicle described in Paragraph No. 5.

14. That no negligence of plaintiff contributed to the happening of the aforesaid contact between said vehicles.

15. That as a result of the aforesaid contact between the two said vehicles, plaintiff sustained serious personal injuries, pain, suffering and mental anguish and, in addition thereto, some of said injuries are permanent in nature and, in addition thereto, plaintiff has become obliged to expend sums of money in an attempt to cure himself from said injuries and, upon information and belief, plaintiff will become obliged to spend such sums of money in the future and, in addition thereto, plaintiff has lost earnings, and upon information and belief, may have been set back and damaged with respect to future earning capacity, all to his damage in the sum of Two Hundred Thousand ($200,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of $200,000.00, together with the costs and disbursements of this action.

Yours, etc.,

O'LEARY & O'LEARY, Esqs.
Attorneys for Plaintiff
Office and P. O. Address
88-14 Sutphin Boulevard
Jamaica, New York 11435
Phone: 212 OL 7-5757

To:

Larkin, Wrenn & Cumisky, Esqs.
Attorneys for Defendants
11 Park Place
New York, New York

(Verified by Stephen W. O'Leary, July 11, 1972.)

Verified Answer.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

The defendants, by the undersigned attorneys, answering the complaint of the plaintiff herein, allege upon information and belief:

FIRST: Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the complaint designated as "4", "6", "7" and "12".

SECOND: Denies each and every allegation contained in the paragraph of the complaint designated as "8", except admits that Gaspare DiGiorgio operated said vehicle with the consent of defendant LPI Transportation Corp.

THIRD: Denies each and every allegation contained in the paragraphs of the complaint designated as "9", "10", "11", "13", "14" and "15".

WHEREFORE, defendants demand judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: New York, New York, July 19, 1972

LARKIN, WRENN AND CUMISKY
Attorneys for Defendants
Office and P. O. Address
11 Park Place
New York New York 10007

To:

O'Leary & O'Leary
88-14 Sutphin Blvd.
Jamaica, New York 11435

(Verified by John J. Wrenn, July 19, 1972.)

Verified Bill of Particulars.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

SIRS:

Plaintiff as and for his Bill of Particulars respectfully alleges:

1. Plaintiff is presently twenty-eight (28) years of age and was born on October 17, 1943. That plaintiff's present address is 5055 Seminary Road, Alexandria, Virginia.

2. December 22, 1971, approximately 11:30 a.m.

3. Said accident occurred on the eastbound exit of the Long Island Expressway in the County of Queens, State of New York, known as Greenpoint Avenue Exit. Said exit also is popularly known as the Van Dam Street Exit. This said accident occurred in the eastbound exit ramp of said exit.

4. That defendants were negligent in the ownership, operation, maintenance and control of their motor vehicle in that they themselves and through an agent, servant or employee operated said motor vehicle at an excessive rate of speed under the circumstances then and there existing, in that they operated said vehicle in a speed in excess of the lawful speed limit on the aforesaid highway, in that they failed to observe the roadway and traffic conditions and other vehicles on the roadway that were plainly visible to them; in that they failed to keep a vigilant and alert watch on the roadway ahead; in that they failed to make a timely application of brakes; in that they failed to give warning of their approach by signal, horn or otherwise; in that they failed to yield the right of way to the vehicle in which plaintiff was a passenger; in that they failed to drive their vehicle in the proper lane of traffic; in that they failed to maintain their vehicle under control; in that they failed to observe

cones and stanchions on the roadway and make the appropriate driving adjustments with their vehicles; in that they failed to maintain their vehicle in a safe and operable condition; in that they were otherwise negligent in the ownership, operation, maintenance and control of their vehicles; in that they failed to use reasonable care under the circumstances; in that they violated the applicable statutes, rules, ordinances, laws and rules of the road in the premises; and in that they were otherwise negligent in the premises.

5. and 6. Not applicable.

7. That plaintiff sustained the following injuries: (1) Comminuted fracture of the shaft of the tibia and fibula of the right leg at the junction of the middle and distal third with displacement. With respect to this fracture, there were two closed reduction operations performed on the plaintiff at the St. John's Hospital. That a long leg cast was applied to the right leg of plaintiff which immobilized him. (2) Fracture of the left os calcis. That a closed manipulation operation and Jones compression bandage of this fracture was performed on the plaintiff at the St. John's Hospital. (3) Compound comminuted fracture of the distal phalanx of the left great toe with loss of nail. That in the Emergency Room debridement, irrigation and suture of the laceration of the left great toe were performed. That with respect to the aforesaid injury to the left great toe of plaintiff there was an area of skin necrosis at the tip of the left toe. (4) Fracture of the styloid process of the ulna of the right wrist. That a closed reduction operation was performed with respect to this wrist injury. (5) Dislocations of carpal lunate, right.

That after the plaintiff was discharged from the St. John's Hospital, he was placed in the National Orthopedic and Rehabilitation Hospital at Washington, D. C. That he was taken to the operating room where a closed reduction of the right tibia and fibula was performed without correct-

ing the deformity. A Steinman pin was placed in the right tibia and traction placed in the Boehler-Braun frame and the left great toe was debrided at this time. On January 13, 1972, the plaintiff was returned to the operating room where the fracture was manipulated. That two pins were placed above the fracture and one was left below the fracture and a cast was applied. On January 13, 1972, the left heel and lower leg were also casted. The left great toe was again debrided. On January 26, 1972, the cast was taken from the right wrist where X-rays showed the dislocation of the carpal lunate. An open reduction of this fracture was performed at said hospital. At this point the right arm and wrist were again casted. That on or about February 10, 1972, the plaintiff was ambulating with a walking cast on the right side. The cast on the left heel and right wrist were removed and physiotherapy was begun with the right wrist. At the time of discharge from said hospital on February 25, 1972, the plaintiff required two crutches, one with an arm platform for his right side, in order to walk. On March 28, plaintiff still needed crutches, without the arm platform, to walk. The right leg cast was removed on the 28th. At that time, plaintiff again depended heavily on the crutches. Several weeks later, plaintiff began to walk with a cane. Plaintiff used this cane for several more weeks. That on March 28, 1972, the plaintiff was having problems with dorsiflexion of the right wrist. The left tibia had clinically united although there was not complete consolidation of the fracture. That, in addition, as late as May 8, 1972, the plaintiff still had difficulty with respect to dorsiflexion of his right ankle. In addition, he also had a clicking sensation in his right wrist joint. As late as July 7, 1972, the plaintiff was still extremely limited in flexion and extension of his right wrist.

That all of the aforesaid injuries were accompanied by pain, mental anguish, limitation and restriction of motion. In addition thereto, plaintiff alleges, upon information and belief, that all of the aforesaid injuries involve dam-

age to the surrounding nerves, blood vessels and musculature. In addition thereto, plaintiff can engage in no jumping or other athletics requiring any degree of strenuous exercise with respect to his leg. Plaintiff still has a slight limp and becomes sore when walking for a long period of time. In addition thereto, plaintiff has pain in the nail and joint of his great toe and cannot stand for long periods of time. In addition thereto, plaintiff still has extensive restriction of motion and restriction of use of his right hand and right wrist and can perform no mechanical chores or other daily commonplace actions which require flexion of the wrist. Plaintiff's motion upwards with his right arm and when lifting objects; also his ability to grip with his right hand is severely compromised by this injury. In addition thereto, plaintiff was an avid sportsman and all his activities in this area have been either completely abrogated or severely compromised by the injuires he sustained herein.

That upon information and belief all of the above described injuries are permanent in nature.

That plaintiff anticipates that he will have to undergo further medical treatment and reserves the right to allege further complications, aggravations and other aspects of the injuries described herein. In addition thereto, plaintiff reserves the right to allege further additional medical expenses, loss of earnings, loss of advancement opportunities that may come to plaintiff's knowledge in the future.

8. Plaintiff was confined to bed from December 22, 1971, until he returned to work on or about March 30, 1972. During the last two weeks of this confinement, plaintiff left his home occasionally but was substantially confined to bed for this entire period. Plaintiff was confined to the St. John's Hospital from December 22, 1971 until January 7, 1972. Plaintiff was confined to the National Orthopedic Hospital in Washington, D. C. from January 7, 1972 until February 25, 1972.

Verified Bill of Particulars

9/10. That plaintiff was a Management Trainee for the Department of Health, Education and Welfare in Washington, D. C. and at the time of the accident was paid $610.40 every two weeks.

11. Plaintiff's employer was the Food and Drug Administration, Washington, D. C. and plaintiff was out of work from December 22, 1971 until March 30, 1972.

12. That plaintiff was not a student at the time of the accident but had an opportunity to participate in a graduate studies program which opportunity was effectively taken away from plaintiff as a result of this accident. That the details of this opportunity are annexed and attached hereto in Exhibit A. That plaintiff alleges this loss of opportunity as an item of damage together with the cost of this program, which upon information and belief would have been $2,000.00.

13. Plaintiff was totally disabled until March 28, 1972, and is partially disabled to date.

14. That plaintiff has knowledge of the following special damages at this time.

(a) $2,195.20

(b) Included in "(c)".

(c) $5,006.42

That although part of these earnings were reimbursed, that amount being $2,644.11, plaintiff will claim that even the amount which he was reimbursed for during his period of absence was the product of a collateral source and that plaintiff is, therefore, entitled to his entire loss of earnings claimed.

(d) included in "e".

(e) $7,201.00.

(f) Included in "e".

(g) $35.31

Exhibit A, Annexed to Bill of Particulars

Plaintiff reserves the right to allege future special damages.

15. Not applicable.

16. Plaintiff claims that defendants did violate the applicable rules, regulations, statutes, ordinances and rules of the road. Plaintiff will ask the Trial Court at the time of trial to take Judicial Notice of all such applicable rules.

17. At the present time, plaintiff alleges that the defendants violated the following provisions of the Vehicle and Traffic law: 1123 2, 3(b); 1129; 1180; 1213.

18. Not applicable.

Dated: Queens, New York
October 10, 1972.

Yours, etc.,

O'LEARY & O'LEARY, Esqs.
Attorneys for Plaintiff
Office and P. O. Address
88-14 Sutphin Boulevard
Jamaica, New York 11435
Phone: 212 OL 7-5757

To:

Larkin, Wrenn & Cumisky, Esqs.
Attorneys for Defendants
Office and P. O. Address
11 Park Place
New York, New York 10007

(Verified by Stephen W. O'Leary, October 10, 1972.)

Exhibit A, Annexed to Bill of Particulars.

(See opposite page.) ☞

PROGRAM DESCRIPTION

The proposed training program is designed to teach skills in operations research, computer programming, research management, quality control, and statistical analysis. Courses would be scheduled for the 1972 spring semester and the first half of the summer session. The proposed courses are as follows:

Management Science

203 Mathematics for Management (3) -- Mathematical concepts employed in the solution of management problems. Applications to analytical geometry, functions, elements of calculus, and linear algebra to optimization problems.

212 Survey of Data Processing (3) -- A management-oriented presentation of the vocabulary, concepts, and trends in computer hardware and software, information systems design and development, organizational impact, and effective management; milestones of past and current research; computer technology as a rapidly evolving force of major significance in business, government, and industry. Designed to provide comprehension of information technology necessary for contribution to an organizational data processing effort or as preparation for more advanced study.

219 Digital Computer Programming Concepts (3) -- Programming concepts, techniques, and practices as applied to third generation computers. Fundamentals of higher-level languages, flow charting, FORTRAN, COBOL, operating systems, and utility programs. Study programs are run on the University Computer Center's IBM 360 computer. This course will provide the student with an understanding of the role of computer programming in management information systems and management research.

225 Introduction to Managerial Statistics (3) -- Introduction to the mathematics of probability and statistics and its applications in management science and operations research. Topics include random variables; discrete and continuous probability distributions; moments and other descriptive measures; sampling theory; and an introduction to statistical estimation, hypothesis testing, and regression analysis.

226 Managerial Statistics (3) -- Management applications of the theory and techniques of mathematical statistics. Topics include maximum likelihood and other methods of estimation, hypothesis testing, descriptive measures of bivariate distributions, regression and correlation, analysis of time series, econometric models and multiple regression, statistical decision theory, and the revision of probabilities in decision-making.

230 Administration of Research and Development (3) -- Examination of technological, political, and economic factors affecting the R&D environment; operational aspects; management problems in military, governmental, and industrial organizations; project selection, resource allocation, personnel, planning and control, measurement and evaluation.

Statistics

109-10 Quality Control and Reliability Techniques (3-3) -- Statistical methods and probability models for quality control and reliability applications.

During the spring semester, which starts January 24, 1972, and lasts until the middle of May, courses 203, 218, 219, 225 and 109 would be studied. These courses would provide 15 graduate credits and cost approximately $1,250 in tuition, fees and books.

During the first part of the summer session, courses 230, 226 and 110 would be studied; these would provide nine graduate credits and cost about $750 in tuition, fees, and books. The summer program would last from June 12 until July 19, 1972.

Total cost for the entire program would be about $2,000.

EXHIBIT A

From July 14, 1969 until July 1972, I was a Management Trainee with the Department of Health, Education and Welfare (DHEW). During this period, I was assigned to various agencies within the Department. I was paid by the agency to which I was assigned, but I carried my own position. (Each Federal agency is limited to a certain employee position ceiling. In my status of Management Trainee, I could work for any agency without being counted against its ceiling.)

During the autumn of 1971, the Food and Drug Administration, an agency of DHEW, had agreed to pay tuition and all expenses for graduate school for the spring semester and first summer session of 1972 at the George Washington University in Washington, D.C. Although I would have been a full time student during this period, I would have received my regular salary.

I have all the necessary class credits for a Master's degree in Business Administration. The courses I would have taken during this time would have fulfilled a thesis requirement (6 credits) and have enabled me to earn the MBA. In addition, I would have gained 18 credits for a doctorate. The program would have provided a total of 24 graduate credits.

The courses included work in computer program systems, operations research theory and practice, statistical sciences, and research management. (A list of specific courses and their descriptions are attached.) I work on a staff responsible for the preparation of long and short term program plans; the development of budgets; information retrieval and management systems; the allocation of dollar and personnel resources; the evaluation of work effectiveness; and the development and coordination of regional work plans. While I can work effectively on many of these tasks with my current skills, to be optimally effective in all of these areas, particularly at a level of greater responsibility, I should have: (1) a knowledge of computer systems design; (2) skills in determining the statistical significance of food sampling and food processing quality control procedures; and (3) an understanding of research management techniques. The proposed training program would have given me these skills.

While my employers would still be willing to provide me with training, it is much more difficult to do without my presence on the day to day work force. At this time, I am no longer a trainee and I now occupy a position that cannot be filled by another person while I am in training. It is very unlikely that such a training opportunity will be available again.

Robert I Shuiskat

STANDARD FORM 147, JUNE 1964 - F.P.D. PROC. REG. (41 CFR) 1-3.606

ORDER FOR SUPPLIES OR SERVICES

ISSUED BY: [illegible]

MARK ALL PACKAGES AND PAPERS WITH ORDER AND/OR CONTRACT NUMBERS

PAGE 1 OF [illegible]

DATE OF ORDER	CONTRACT NO. (If any)	ORDER NO.
12/8/71		FDA 223-72(3)

ACCOUNTING AND APPROPRIATION DATA

[illegible] 223-72A 40 VC-000703

II 2-[illegible]-2-0364 $1,240.00 20.00

REQUISITIONING OFFICE

REQUISITION NO./PURCHASE AUTHORITY

FL 00-554

CONTRACTOR (Name, address, and ZIP code)

TO →

George Washington University
Student Accounts
2121 I Street, N. W.
Washington, D. C. 20006

SHIP TO (Consignee, address, and ZIP code)

DHEW/FDA
Food and Drug Administration
Training Institute, CA-40
5600 Fishers Lane
Rockville, Maryland 20852

VIA

TYPE OF ORDER

PURCHASE ☐ REFERENCE YOUR [illegible] PLEASE FURNISH THE FOLLOWING ON THE TERMS SPECIFIED ON BOTH SIDES OF THIS ORDER AND ON THE ATTACHED SHEETS, IF ANY, INCLUDING DELIVERY AS INDICATED. THIS PURCHASE IS NEGOTIATED UNDER AUTHORITY OF

DELIVERY ☐ EXCEPT FOR THE BILLING INSTRUCTIONS ON THE REVERSE, THIS DELIVERY ORDER IS SUBJECT TO INSTRUCTIONS CONTAINED ON THIS SIDE ONLY OF THIS FORM AND IS ISSUED SUBJECT TO THE TERMS AND CONDITIONS OF THE ABOVE-NUMBERED CONTRACT.

F.O.B. POINT	GOVERNMENT B./L. NO.	DELIVERY TO F.O.B. POINT ON OR BEFORE	DISCOUNT TERMS

SCHEDULE

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY ORDERED	UNIT	UNIT PRICE	AMOUNT	QUANTITY ACCEPTED
	TITLE AND DESCRIPTION OF TRAINING:					
	Operation Research, Computer Programming, Federal Management, Quality Control & Statistical Analysis					
	PERIOD OF TRAINING:					
	January 24, 1972 thru April 28, 1972				FOR THE COURSE:	$1,073.00
	PERSON TO ATTEND COURSE:				FEES:	74.00
	BUCKLAM, Robert L.				TEXT BOOKS:	150.00

SIZE CLASSIFICATION (Check one) ☐ SMALL BUSINESS ☐ OTHER THAN SMALL BUSINESS

SEE BILLING INSTRUCTIONS ON REVERSE

SHIPPING POINT	GROSS SHIPPING WEIGHT	INVOICE NO.

MAIL INVOICES TO: [illegible] Food and Drug Administration (Include ZIP code) [illegible], CA-40

TOTAL FROM CONTINUATION PAGES		(See reverse for reductions)
GRAND TOTAL →		$1,240.00

UNITED STATES OF AMERICA

BY _____ (Signature)

NAME (Typed)

TITLE [illegible]

[illegible] OFFICIAL OFFICE COPY

147-105-03

Third-Party Summons.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendants and Third-Party Plaintiffs,

against

ROBERT COOPER and ROBERT SHERIDAN,

Third-Party Defendants.

To the above named Third-Party Defendants:

You are hereby Summoned to answer the complaint and third-party complaint in this action and to serve a copy of your answer on Larkin, Wrenn & Cumisky, Esqs., attorneys for Defendants and Third-Party Plaintiffs, at 11 Park Place, New York, New York, within twenty (20) days after the service of this third-party summons and complaint, exclusive of the day of service.

Third-Party Summons

In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the third-party complaint.

Dated: New York, New York
September 21, 1972

LARKIN, WRENN & CUMISKY
Attorneys for Defendants and
Third-Party Plaintiffs
Office & P. O. Address
11 Park Place
New York, New York

Third-Party Defendants' Addresses:

Robert Cooper
43-60 Douglaston Parkway
Douglaston, New York

Robert Sheridan
5055 Seminary Road
Alexandria, Virginia

Third-Party Complaint.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

The defendants and third-party plaintiffs, Gaspare DiGiorgio, LPI Transport Corp., and Pepsi-Cola, Inc., hereinafter referred to as LPI Transport Corp. by its attorneys, Larkin, Wrenn & Cumisky, for a third-party complaint, against the third-party defendants, Robert Cooper and Robert Sheridan, allege upon information and belief:

AS AND FOR A FIRST CAUSE OF ACTION:

FIRST: That at all times hereinafter mentioned, the third-party defendant, Robert Sheridan, was a resident of Alexandria, Virginia.

SECOND: That at all times hereinafter mentioned, the third-party defendant, Robert Cooper, was a resident of Douglaston, New York.

THIRD: That at all times hereinafter mentioned said Robert Sheridan was an employee of the United States Food and Drug Administration, an agency of the United States of America and was acting within the scope of his office or employment.

FOURTH: That at all times hereinafter mentioned said Robert Cooper was an employee of the United States Food and Drug Administration, an agency of the United States of America and was acting within the scope of his office or employment.

FIFTH: That at all times hereinafter mentioned said Robert Sheridan was not acting within the scope of his office or employment.

Third-Party Complaint

SIXTH: That at all times hereinafter mentioned said Robert Cooper was not acting within the scope of his office or employment.

SEVENTH: That at all times hereinafter mentioned said Robert Cooper and Robert Sheridan were engaged in a joint venture.

EIGHTH: That at all times hereinafter mentioned said Robert Cooper was subject to the supervision and control of his supervisor, Robert Sheridan, while acting within the scope of his office or employment.

NINTH: That on December 22, 1971 at or about 11:00 a.m., the third-party defendant, Robert Sheridan, was a passenger in a Rambler motor vehicle, registration number GF1144601 which was operated by the third-party defendant, Robert Cooper, on the Van Dam Exit of the eastbound lane of the Long Island Expressway.

TENTH: That said vehicle being operated by Robert Cooper was owned by the United States Government.

ELEVENTH: That at all times hereinafter mentioned said vehicle was in contact with a motor vehicle operated by defendant, Gaspare DiGiorgio, which vehicle was owned by defendant LPI Transport Corp.

TWELFTH: That the aforesaid contact between said vehicles was caused solely by the negligence of the third-party defendants in the operation, maintenance, management and control of said motor vehicle.

THIRTEENTH: That at all times hereinafter mentioned said motor vehicle operated by the third-party defendant, Robert Cooper, was operated under the sole supervision and control of his supervisor, Robert Sheridan, during and within the scope of his employment.

FOURTEENTH: That the plaintiff, in his complaint, a copy of which is annexed hereto, alleges in substance

that on the 22nd day of December, 1971, the plaintiff sustained injuries as a result of the negligence of the defendants, to which complaint defendants and third-party plaintiffs beg leave to refer to in full at the time of the trial of this matter.

FIFTEENTH: That if the plaintiff was caused to sustain damages at the time and place set forth in the plaintiff's complaint through any carelessness, recklessness, negligence other than the plaintiff's own carelessness, recklessness and negligence said damages were sustained by reason of the sole active and primary carelessness, recklessness and negligence and/or affirmative acts of omission or commission by the plaintiff and third-party defendants their agents, servants and/or employees; and if any judgment is recovered herein by the plaintiff against these defendants they will be damaged thereby and the plaintiff and third-party defendants will be primarily liable therefor.

SIXTEENTH: That by reason of the foregoing the plaintiff and third-party defendants will be liable to these defendants in the event and in the amount of a recovery, or any portion of any recovery herein by the plaintiff, and the plaintiff and third-party defendants are bound to pay any and all attorneys' fees and costs of investigation and disbursements.

WHEREFORE, defendants and third-party plaintiffs demand judgment dismissing the complaint herein as to the defendants and third-party plaintiffs and further demands that the ultimate rights of the plaintiffs and third-party defendants and these defendants as between themselves be determined in this action and that these defendants have judgment over and against the plaintiff and/or third-party defendants for the amount of any verdict or judgment, or portion thereof, which may be obtained herein by the plaintiff against these defendants, together

Notice of Removal by U. S. Attorney

with the costs and disbursements of the action plus all attorneys' fees and all other costs herein.

Dated: New York, New York
September 21, 1972

LARKIN, WRENN & CUMISKY
Attorneys for Defendants and
Third-Party Plaintiffs

(Verified, September 22, 1972.)

Notice of Removal by U. S. Attorney.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendants and Third-Party Plaintiffs,

against

ROBERT COOPER,

Third-Party Defendant.

To:

Larkin, Wrenn and Cumisky, Esqs.
11 Park Place
New York, New York

Please Take Notice that on January 2, 1972, the third-party defendant Robert Cooper, filed in the office of the

Notice of Removal by U. S. Attorney

Clerk of the United States District Court for the Eastern District of New York, his petition for the removal of the above-entitled action to the said United States District Court; a copy of such petition is annexed hereto.

A copy of the petition is being filed with the Clerk of the Supreme Court of the State of New York, County of Kings, pursuant to Title 28, United States Code, Section 1446(e).

Dated: Brooklyn, New York
Jan. 2, 1972

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Third Party Defendant
225 Cadman Plaza East
Brooklyn, New York 11201
By: /s/ MICHAEL F. CRAWFORD
Assistant U. S. Attorney

Petition for Removal.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendants and Third-Party Plaintiffs,

against

ROBERT COOPER,

Third-Party Defendant.

To the Honorable Judges of the United States District Court for the Eastern District of New York:

Petitioner, ROBERT COOPER, respectfully represents:

1. That he is the third-party defendant in the above-captioned civil action now pending in the Supreme Court of the State of New York, County of Kings, New York City, New York, and that no trial has yet been had therein. Copies of all process, pleadings, and orders served upon defendant, Robert Cooper, in such action are attached hereto.

2. That the above-captioned action is one which may be removed without bond to this Court pursuant to subsection (d) of Section 2679, Title 28, United States Code, for the reasons that (a) defendant and third-party plaintiffs in such action seek judgment for damages resulting from the allegedly negligent operation of a motor vehicle by third-party defendant; (b) at the time of the alleged accident, third-party defendant was acting within the scope of his office or employment as an employee of the United

States; and (c) remedy by suit within the meaning of subsection (b) of Section 2679, Title 28, United States Code, is therefore available to the defendant and third-party plaintiffs against the United States.

3. Attached hereto is a certification by the United States Attorney that third-party defendant was acting within the scope of his employment at the time of the alleged occurrence.

WHEREFORE, petitioner prays that the above-captioned action now pending in the Supreme Court of the State of New York, County of Kings, New York City, New York, be removed therefrom to this Court and that it thereupon be deemed a tort action against the United States under the provisions of Section 1346(b), Title 28, United States Code.

Brooklyn, New York
December 29, 1972.

/s/ ROBERT COOPER

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Petitioner
By: /s/ MICHAEL F. CRAWFORD
Assistant U. S. Attorney

(Certified by Robert A. Morse, December 29, 1972.)

Affidavit of John J. Wrenn in Opposition to Petition.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DIGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, Inc.,

Defendants and Third Party Plaintiffs,

against

ROBERT COOPER and ROBERT SHERIDAN,

Third Party Defendants.

State of New York,
County of New York, ss:

JOHN J. WRENN, being duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice in the Courts of the State of New York, and is a member of the firm of Larkin, Wrenn and Cumisky, attorneys for the defendants and third party plaintiffs herein.

That this affidavit is submitted in opposition to the petition for removal by the United States attorney.

That the Court's attention is directed to the caption in this matter, wherein the third party defendants are Robert Cooper and Robert Sheridan. That as the Court can see, the caption on the notice of removal submitted by the United States attorney omits Robert Sheridan from the caption.

Affidavit of John J. Wrenn in Opposition to Petition

That it is respectfully submitted that both third party defendants were in fact involved in an automobile accident under similar circumstances. Robert Cooper was the driver and Robert Sheridan was the passenger. Both were employees of the United States Food & Drug Administration at the time of this accident and may or may not have acted within the scope of their employment.

That as the Court can see from a copy of the Third Party Complaint annexed to the petition for removal, it is alleged that these gentlemen were engaged in a joint venture and in addition to which, Robert Cooper was subject to the supervision and control of his supervisor, Robert Sheridan.

That it is respectfully submitted that the failure of the United States attorney to join all of the defendants in the petition for removal is fatal to his application for removal and the case should be remanded.

That a Summons and Complaint was served upon Robert Cooper on September 26, 1972.

That Robert Sheridan was served with a Summons and Complaint on October 5, 1972.

That we received and granted a request extending the time of the third party defendants Robert Cooper and Robert Sheridan to answer up to and including November 30, 1972. That a copy of said stipulation is annexed hereto and made a part hereof.

That we received an answer on behalf of the third party defendant Robert Sheridan dated October 3, 1972. That a copy of said answer is annexed hereto and made a part hereof. That to date, we have never received any answer on behalf of the third party defendant Robert Cooper.

That a copy of the petition for removal was received at this office on January 3, 1973.

Stipulation Extending Time to Answer, Annexed to Affidavit of John J. Wrenn

That it is respectfully submitted that on its face the petition for removal is not timely made and should be denied.

WHEREFORE, your deponent respectfully requests that the within petition be denied and the case be remanded to the State Court for further proceedings.

(Sworn to by John J. Wrenn, January 9, 1973.)

Stipulation Extending Time to Answer, Annexed to Affidavit of John J. Wrenn.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

IT IS HEREBY STIPULATED that the time for the third-party defendants Robert Cooper & Robert Sheridan to appear and to answer, amend or supplement the answer as of course or to make any motion with relation to the summons or to the complaint in this action, be and the same hereby is extended to and including the 30th day of November 1972.

Dated: October 3, 1972

LARKIN, WRENN & CUMISKY, ESQS.
Attorneys for Third Party Plaintiffs
11 Park Place
New York, New York

Kindly Sign and Return Original. Thank You!

Answer of Third-Party Defendant, Robert Sheridan, Annexed to Affidavit of John J. Wrenn.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

Third-Party Defendant Robert Sheridan, as and for his Answer to the Third-Party Complaint of Third-Party Plaintiffs herein, respectfully alleges:

1. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph numbered "Second" of the Third-Party Complaint herein.

2. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph numbered "Fourth" of the Third-Party Complaint herein.

3. Denies each and every allegation contained in Paragraph numbered "Fifth" of the Third-Party Complaint herein.

4. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraph numbered "Sixth" of the Third-Party Complaint herein.

5. Denies each and every allegation contained in Paragraphs numbered "Seventh" and "Eighth" of the Third-Party Complaint herein.

6. Denies each and every allegation contained in Paragraph numbered "Ninth" of the Third-Party Complaint herein, except admits that plaintiff Robert Sheridan was a passenger in said vehicle which was involved in an accident with the vehicle of Third-Party Plaintiffs at the Greenpoint Avenue exit of the Long Island Expressway.

Answer of Third-Party Defendant, Robert Sheridan, Annexed to Affidavit of John J. Wrenn

7. Denies each and every allegation contained in Paragraph numbered "Eleventh" of the Third-Party Complaint herein, except admits contact between the two motor vehicles at the Greenpoint Avenue exit of the Long Island Expressway.

8. Denies each and every allegation contained in Paragraphs numbered "Twelfth" and "Thirteenth" of the Third-Party Complaint herein.

9. Denies each and every allegation contained in Paragraphs numbered "Fifteenth" and "Sixteenth" of the Third-Party Complaint herein.

WHEREFORE, Third-Party Defendant Robert Sheridan demands judgment against the Third-Party Plaintiffs herein dismissing the Third-Party Complaint, together with the costs and disbursements of the action, plus any and all attorneys' fees and other costs herein.

Dated: Queens, New York
October 3, 1972

O'LEARY & O'LEARY
Attorneys for Third-Party Defendant
Robert Sheridan
Office and P. O. Address:
88-14 Sutphin Boulevard
Jamaica, New York 11435

(Verified by Stephen W. O'Leary, October 3, 1972.)

Order by Travia, D. J., Dated February 21, 1973, Granting Petition for Removal.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendant and Third Party Plaintiffs,

against

ROBERT COOPER,

Third Party Defendant.

73 Civ. 7

Upon the subjoined consent and the third party defendant having moved this Court by Notice of Removal and Petition to remove this case now pending in the Supreme Court of the State of New York, County of Kings, to the United States District Court, Eastern District of New York, and that it thereupon be deemed a tort action against the United States under the provisions of Section 1346(b) Title 28 of the United States Code and the said motion having regularly come on to be heard on the 2nd day of February, 1973,

Now, on reading and filing the Notice of Removal dated January 2, 1973, the Petition of Robert Cooper, dated December 29, 1972 in support of said notice of removal and the attorney for the defendant and third party plaintiff having moved to remand upon the affidavit of John J. Wrenn, dated the 9th day of January, 1973 in support of said remand, and Robert A. Morse,

Order by Travia, D. J., Dated February 21, 1973, Granting Petition for Removal

attorney for the third party defendant, by Lloyd Baker, having appeared in support of said Petition and Larkin, Wrenn & Cumisky by John J. Wrenn, having appeared in opposition and in support of the notice to remand and the attorneys for the plaintiff and third party defendant Robert Sheridan who did not oppose the motion and not having appeared at the argument of said motion and due deliberation having been had thereon,

Now, on motion of Larkin, Wrenn & Cumisky attorneys for defendants and third party plaintiffs herein, it is

ORDERED that the Petition for Removal be and the same is hereby granted on consent, and it is further

ORDERED, that the action now pending in the Supreme Court, Kings County be and the same is hereby removed from the said Supreme Court to the United States District Court for the Eastern District of New York, and it is further

ORDERED that the United States of America be substituted as third party defendant in place of Robert Cooper; and it is further

ORDERED that the third party defendant, United States of America, shall have thirty days from the date of this order within which to serve an answer to the third party complaint; and it is further

ORDERED that upon such transfer the said action shall continue in this court as if originally instituted therein; and it is further

ORDERED that the case shall be deemed a jury case except as against the United States of America and shall proceed accordingly; and it is further

Order by Travia, D. J., Dated February 21, 1973, Granting Petition for Removal

ORDERED that the Clerk of this Court, upon payment to him of the fees provided by law, shall place this action upon the tort jury calendar of this Court in the same position it would have had if this action had been commenced in this court.

Dated: Westbury, New York
February 21, 1973

A. J. T.
USDJ

Consented To:

Robert A. Morse
Attorney for Third Party Defendant
Robert Cooper
By Lloyd Baker

Larkin, Wrenn and Cumisky
Attorneys for Defendants and Third
Party Plaintiffs
By John J. Wrenn

Supplemental Bill of Particulars (Interrogatories).

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendant and Third Party Plaintiffs,

against

ROBERT COOPER,

Third Party Defendant.

73 Civ. 7

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7. Upon information and belief, in addition to the previous allegations in response to demand 7 of defendant, plaintiff makes the following additional allegations:

Upon information and belief, plaintiff's right wrist has dorsiflexion to 45 degrees, palmer flexion to 45 degrees, this compares to 75 and 60 degrees on the normal left side. Plaintiff lacks 5 degrees pronation, 10 degrees supination.

Upon information and belief, plaintiff's right ankle lacks 10 degrees planterflexion, in plaintiff's left ankle he lacks 5 degrees of eversion.

Upon information and belief, plaintiff's left great toe is extremely tender, the nail is deformed and there is tenderness to palpation over the distal tip. Plaintiff will probably need a Syme type amputation of this toe within the next year.

Upon information and belief, plaintiff has permanent impairment of the back and extremities. Plaintiff has a

10% impairment of the upper extremity due to problems with the right wrist. Plaintiff has a 5% permanent partial disability of the right ankle, secondary to the injury and a 5% permanent partial disability of the left lower extremity.

Upon information and belief, plaintiff has a 15% permanent partial disability of the left lower extremity due to the ankle and foot.

Upon information and belief all of the aforesaid additional allegations involve permanent injuries.

14A. From this $2195.20 to $3109.65. This increase represents the additional $914.45 in medical bills.

Dated: Queens, New York
March 9, 1973

Yours, etc.,

O'LEARY & O'LEARY, Esqs.,
Attorneys for Plaintiff
88-14 Sutphin Boulevard
Jamaica, New York 11435

To:

Larkin, Wrenn & Cumisky, Esqs.,
11 Park Place
New York, New York 10007

Notice of Motion to Resettle Order of Travia, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendant & Third Party Plaintiffs,

against

ROBERT COOPER,

Third Party Defendant.

73 Civ. 7

SIR:

Please Take Notice, that upon the annexed Affidavit of Stephen W. O'Leary, Esq., duly sworn to the 24th day of May, 1973, and upon all the prior pleadings and proceedings heretofore had herein, the undersigned will move this Court at Motion Part at the Courthouse located at 1500 Privado Road, Westbury, New York, on the 8th day of June, 1973, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order re-settling the Order of Judge Anthony J. Travia dated February 21, 1973, so as to provide the caption of the above entitled action to amended from:

Notice of Motion to Resettle Order of Travia, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, Inc.,

Defendant & Third Party Plaintiffs,

against

ROBERT COOPER,

Third Party Defendant.

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to:

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendants and Third Party Plaintiffs,

against

ROBERT COOPER and ROBERT SHERIDAN,

Third Party Defendants.

Notice of Motion to Resettle Order of Travia, D. J.

together with such other and further relief which to this Court may seem just and proper.

Dated: Queens, New York
May 24, 1973

Yours, etc.,

O'LEARY & O'LEARY, Esqs.,
Attys for Plaintiff, Sheridan
88-14 Sutphin Boulevard
Jamaica, New York 11435

To:

Larkin, Wrenn & Cumisky, Esqs.
Attys for Defts and Third Party Pltfs
11 Park Place
New York, New York 10007

Robert A. Morse, Esq.
Atty for U. S. A.
1500 Privado Road
Westbury, New York

Affidavit of Stephen W. O'Leary in Support of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendant & Third Party Plaintiffs,

against

ROBERT COOPER,

Third Party Defendant.

State of New York,
County of Queens, ss:

STEPHEN W. O'LEARY, being duly sworn, deposes and says:

That I am a member of the bar of the United States District Court and I make this Affidavit in support of a Motion to amend the caption that appeared on the Order of Judge Anthony J. Travia dated February 21, 1973.

That your deponent's son, Stephen Jr., had a conversation on the phone with Judge Anthony J. Travia in which Judge Anthony J. Travia suggested that the main case, that is the case in which the injured person Robert Sheridan was suing for personal injuries against Gaspare DiGiorgio and LPI Transport Corp., also be removed to the United States District Court together with the Third Party action in which LPI Transport Corp. and Gaspare DiGiorgio are bringing a cause of action against Robert Cooper and United States of America for idemnification and/or contribution.

Affidavit of Stephen W. O'Leary in Support of Motion

That your deponent consented to Judge Anthony J. Travia's suggestion that both the main action and the Third Party action be transferred to the United States District Court.

That on May 23, 1973, an attorney from this office was advised by the Calendar Clerk that the case of Robert Sheridan against LPI Transport Corp. and Gaspare DiGiorgio was *not* pending in the United States District Court.

It appears that due to an oversight, the main case of Robert Sheridan against Gaspare DiGiorgio and LPI Transport Corp. was not included in the caption of the Order removing the case to the United States District Corp.

In order to rectify this oversight, your deponent believes that the Order should be resettled so as to contain the correct caption.

That no previous application has been made for the relief requested herein.

WHEREFORE, your deponent respectfully requests that this Court make and enter an Order granting the relief prayed for in the Notice of Motion, together with such other and further relief which to this Court may seem just and proper.

(Sworn to by Stephen W. O'Leary, May 24, 1973.)

Letter From U. S. Attorney to Travia, D. J.

JDPJr:MFC:ms
F. 720758

July 19, 1973

Hon. Anthony J. Travia
United States District Judge
United States Court House
Eastern District of New York
Brooklyn, New York 11201

Honourable Sir:

In accordance with our conversation of July 12, 1973, I am writing this letter informing the Court that the United States does not intend to stipulate to the removal of the case of Robert Sheridan v. Gaspare DiGiorgio, etc. from the Supreme Court, Kings County, to this Court. In accordance with our conversation, I requested that the motion be restored to your calendar for September 7, 1973 at 10:00 a.m. I will also move at that time to amend the government's answer so as to include the affirmative defenses of Workmen's Compensation and failure of the third-party plaintiff to file a notice of claim pursuant to the Federal Tort Claims Act.

Very truly yours,

ROBERT A. MORSE
United States Attorney
By: MICHAEL F. CRAWFORD
Assistant U. S. Attorney

cc: O'Leary & O'Leary, Esqs.
88-14 Sutphin Boulevard
Jamaica, New York 11435

Larkin, Wrenn and Cumisky, Esqs.
11 Park Place
New York, New York 10007

Notice of Motion to Amend Answer of Third-Party Defendant, United States of America.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendant and Third-Party Plaintiffs,

against

ROBERT COOPER,

Third-Party Defendant.

Civil Action No. 73 C 7

SIRS:

Please Take Notice that upon the affidavit of Michael F. Crawford, sworn to the 2 day of August, 1973, and upon all the prior pleadings and proceeding herein, the undersigned will move this Court at a Motion Part thereof to be held at United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, in Courtroom #9, on the 14th day of September, 1973, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order pursuant to Rule 15A for leave to amend the answer of third-party defendant, United States of America, and to deem the proposed amended

answer attached hereto as the answer of the United States of America.

Dated: Brooklyn, New York
August 2, 1973

Yours, etc.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for the United States of America
225 Cadman Plaza East
Brooklyn, New York 11201

To:

O'Leary and O'Leary, Esqs.
88-14 Sutphin Boulevard
Jamaica, New York 11435

Larkin, Wrenn and Cumisky, Esqs.
11 Park Place
New York, New York 10007

Affidavit of Michael F. Crawford in Support of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendant and Third-Party Plaintiffs,

against

ROBERT COOPER,

Third-Party Defendant.

Civil Action No. 73 C 7

State of New York,
County of Kings, ss:

MICHAEL F. CRAWFORD, being duly sworn, deposes and says; that he is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such. He is familiar with the facts of this case as stated in a file maintained in his office.

Plaintiff, Robert Sheridan, is suing defendant and third-party plaintiffs for damages he alleges were caused by their negligence. They are suing the United States of American for contribution under the theory of impleading a joint tortfeasor in New York pursuant to *Dole v. Dow Chemical Company*, decided by the New York Court of Appeals in March, 1972.

Leave should be freely given when justice so requires to allow a party to amend its pleadings. The United States of America seeks leave to amend its answer to

include the affirmative defenses of Workmen's Compensation and failure to file a proper notice of claim. Justice Requires that leave be given to amend the answer to include these defenses.

New York law is not settled as to the ultimate merit of these defenses. The defendants and third-party plaintiffs may well be successful in their defense of the lawsuit by Robert Sheridan thus making this case moot. This Court has the discretion whether or not to remove the prime case to this Court. Discretion would be better served by not removing the prime case and allowing the New York Courts to reach a conclusion on the defenses of Workmen's Compensation and failure to file a proper notice of claim before this Court entertains the issues.

WHEREFORE, your deponent respectfully requests that an order be issued pursuant to Rule 15A granting leave to the third-party defendant, United States of America, to amend its answer and denying the plaintiff's motion to remove the prime action to this Court, and for such other and further relief as to this Court may seem just and proper.

(Sworn to by Michael F. Crawford, August 2, 1973.)

Proposed Amended Answer of Defendant United States of America.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GASPARE DIGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, Inc.,

Defendant and Third-Party Plaintiffs,

against

ROBERT COOPER,

Third-Party Defendant.

Civil Action No. 73 C 7

The third-party defendant, United States of America, answering for Robert Cooper, by its attorney, Robert A. Morse, United States Attorney for the Eastern District of New York, in answering the third-party plaintiff's complaint, respectfully alleges:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "First" and "Fourteenth" of the complaint.

SECOND: Admits the allegations contained in paragraphs "Second", "Third", "Fourth", "Eighth", "Ninth", "Tenth" and "Eleventh" of the complaint.

THIRD: Denies each and every allegation contained in paragraphs "Fifth", "Sixth", "Seventh", "Twelfth", "Thirteenth", "Fifteenth" and "Sixteenth" of the complaint.

Proposed Amended Answer of Defendant United States of America

AS AND FOR A FIRST SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THIRD-PARTY DEFENDANT ALLEGES:

FOURTH: Whatever injuries and damages plaintiff sustained as a result of the alleged accident were caused solely by the failure of Gaspare DiGiorgio, LPI Transport Corp. and Pepsi-Cola, Inc. to exercise due care and diligence, and by plaintiff's carelessness and negligence, without any negligence on the part of the third-party defendant contributing thereto.

AS AND FOR A SECOND SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THIRD-PARTY DEFENDANT ALLEGES:

FIFTH: Defendant, United States of America, its agencies and employees, exercised due care and diligence in all the matters alleged in the complaint herein, and no act or failure to act of the defendant or any agency, or employee of the defendant was the proximate cause of any damage, loss or injury to the plaintiff.

AS AND FOR A THIRD SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THIRD-PARTY DEFENDANT ALLEGES:

SIXTH: That pursuant to Title 28, United States Code 2679(b), Robert Cooper is not a proper party to this lawsuit and the United States of America should be substituted in place of Robert Cooper as third-party defendant.

AS AND FOR A FOURTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THIRD-PARTY DEFENDANT ALLEGES:

SEVENTH: That plaintiff, Robert Sheridan, is covered by the Federal Employees Compensation Act and any

claim by him against his employee is, therefore, barred and any claim by a joint tortfeasor is also barred.

AS AND FOR A FIFTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, THIRD-PARTY DEFENDANT ALLEGES:

EIGHTH: That neither plaintiff nor third-party plaintiff has complied with the terms of the Federal Tort Claims Act in filing a proper notice of claim against the United States of America and this suit is, therefore, barred.

WHEREFORE, third-party defendant, United States of America, demands judgment dismissing the complaint of third-party plaintiff herein against it together with the costs and disbursements of this action, and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York
August 1973

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Third-Party Defendant
United States of America
225 Cadman Plaza East
Brooklyn, New York 11201
By: MICHAEL F. CRAWFORD
Assistant U. S. Attorney

Affidavit of John J. Wrenn in Opposition to Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ROPERT SHERIDAN,

Plaintiff,

against

GASPARE DIGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, Inc.,

Defendants and Third Party Plaintiffs,

against

UNITED STATES OF AMERICA and ROBERT SHERIDAN,

Third Party Defendants.

73 Civ. 7

State of New York,
County of New York,

JOHN J. WRENN, being duly sworn, deposes and says:

That I am a member of the firm of Larkin, Wrenn and Cumisky, attorneys for Defendants and Third Party Plaintiffs.

That this affidavit is submitted in opposition to the motion by the Third Party Defendant United States of America.

That this case concerns itself with a cause of action for personal injuries by Robert Sheridan which allegedly occurred on December 22, 1971 when he was a passenger in an automobile operated by Robert Cooper and owned by the United States Government, which was involved in

an accident on the Long Island Expressway with a motor vehicle operated by Gaspare DiGiorgio.

That issue was joined in the main action by service of an Answer in the Supreme Court, Kings County on July 19, 1972.

That a third party action was commenced by the service of the third party summons and complaint on Robert Cooper on September 26, 1972. That Robert Sheridan was served with a summons and complaint on October 5, 1972. That an Answer was interposed on behalf of the third party defendant Robert Sheridan on October 3, 1972. That a copy of the petition for removal was received on January 3, 1973.

That on February 2, 1973, we appeared before Judge Travia and argued the motion. Mr. Baker appeared on behalf of the United States of America and the attorney for the plaintiff Robert Sheridan did not appear.

That after argument, the Court made inquiries as to whether or not we had any objection to the entire matter, that is the main action and the third party action, being removed to the Federal Court. The United States attorney and your affiant both agreed that the entire matter should be removed to the Federal Court.

That the attorney for the plaintiff was not present. However, upon informaion and belief, the Court contacted the attorney for the plaintiff and he also consented to the removal, all parties feeling that it would be in the best interest of all concerned and lead to the expeditious resolution of the entire matter if the cases were tried together.

That a consent order was submitted and signed, a copy of said consent order is annexed hereto and made a part hereof. That as the Court can see, the consent order provides that the action pending in Supreme Court, Kings County is removed to the United States District Court and the order further provides that the case shall be

deemed a jury case except as against the United States of America. That it is certainly obvious based upon the stipulation in open court as well as the consent order that the United States' Attorney's office consented to the removal of the entire matter. A copy of the order with notice of entry was served upon all parties on April 11, 1973.

That subsequent thereto, we received an Answer from the United States of America and as the Court will note from the caption, it reflects the stipulation entered into that the entire matter had been removed to the Federal Court.

That on August 3, 1973, we received a Notice of Motion and Memo of Law from the United States' Attorney's office, wherein they seek an order for leave to amend the Answer to the third party complaint. That they have on their own amended the caption and from various conversations had with the Assistant United States Attorneys, they now do not want to agree to try the entire matter in the Federal Court.

We are in receipt of a letter dated August 24, 1973, where the United States' Attorney's office indicates the intention to withdraw the motion to change the wording of the proposed Answer.

That it is respectfully submitted that the letter dated August 24, 1973 indicates that the matter is to be "untangled".

That it is respectfully submitted that there is no confusion as to what was actually removed. It is clear and the Court records will indicate that the entire matter was removed to the Federal Court upon consent of all parties. The apparent confusion in the mind of the United States Attorney results from the plaintiff's motion and the plaintiff has advised me that the motion was made because of advices he received from the Clerk of the Court and not from any misunderstanding as to

exactly what the status of the case is. I am sure that after the Court has reviewed the affidavit submitted by the attorney for the plaintiff, that all parties will see that there is no difficulty to untangle and that the only further steps necessary would be for the United States' Attorney's office to make whatever motions he deems appropriate and then litigate the various issues.

WHEREFORE, it is respectfully submitted that the within motion be denied and for such other and further relief as this Court may deem just and proper.

(Sworn to by John J. Wrenn, August 29, 1973.)

Letter From O'Leary and O'Leary to Honorable Anthony J. Travia.

O'LEARY AND O'LEARY

ATTORNEYS AT LAW

88-14 Sutphin Boulevard

Jamaica, New York 11435

OLympia 7-5747

OLympia 7-5943

August 30, 1973

Honorable Anthony J. Travia
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Letter From O'Leary and O'Leary to Honorable Anthony J. Travia

Re: Gaspare DiGiorgio v. Cooper
Civil Action No. 73 C 7
Our File 4257

Dear Judge Travia:

On August 24, 1973 your Honor received a letter from the United States Attorney with reference to the above matter. This letter seemed to imply that our firm was confused as to the status of this case, in which we represent plaintiff Robert Sheridan. The purpose of this letter is to respond to those allegations and to set the record clear.

Sometime in February 1973 Stephen O'Leary, Jr. advised this Honorable Court that our firm consented to the removal of the main action to the Federal Court.

Thereafter our firm was under the impression that the entire action had been removed to the Federal Court. However, upon checking the Court records, our firm was advised by the clerk of the Court that only the third-party action had been removed.

Prior to the time that our firm checked the Court records in the Federal Court, the case had been called for a pretrial conference in Supreme Court, Kings County. At this time we advised the Court that the case had been removed to the Federal Court.

When we later learned that the Court records in the Federal Court did not reflect the removal of the main action to the Federal Court, we immediately made a motion in Supreme Court, Kings County, to restore the case to the Calendar. We made this motion in order to protect the interests of our client in the event it did, in fact, turn out that the main action was not removed to the Federal Court.

Letter From O'Leary and O'Leary to Honorable Anthony J. Travia

There is now a motion pending before your Honor to remove the main action to the Federal Court. At the request of the United States Attorney we have adjourned the motion in Supreme Court, Kings County, and have agreed that we will adjourn said motion until your Honor has decided whether or not the main action should be removed to the Federal Court. In the event your Honor does decide to remove the main action to the Federal Court, we will withdraw our motion in Supreme Court, Kings County. However, in the event your Honor decides not to remove the main action to the Federal Court, we will then proceed with our motion in Supreme Court, Kings County.

In the event your Honor decides to remove the main action to the Federal Court and have the entire case tried in the Federal Court, we would join in the request of the United States Attorney that a pretrial conference be held in the above matter.

Thank you for your patience and attention.

Respectfully yours,

STEPHEN W. O'LEARY

SWOL:mg

CC: Robert A. Morse, Esq.
United States Attorney

Larkin, Wrenn & Cumisky, Esqs.

Borge Varmer, Esq.
Regional Attorney—Region II
Dept. of Health, Education & Welfare

Stipulation as to Removal.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS STIPULATED that:

(a) When the tort action in the New York State Supreme Court, County of Kings, Index Number 23275/1972 was removed under the provisions of 28 U. S. C. §§ 2679(d) and 1442;

(1) the United States Attorney, Eastern District of New York, acting under 28 C. F. R. §15.3 as the delagee of the Attorney General of the United States, and following the procedures in 28 U. S. C. §1446, removed the entire case under Index No. 232275/1972 to the United States District Court, Eastern District of New York, with no part of the action remaining in the State Court; and

(2) The United States of America was substituted as a third party defendant for third party defendant Robert Cooper who had been certified by the United States Attorney, Eastern District of New York, as acting within the scope of his employment as an employee of the United States while operating a motor vehicle involved in the incident from which this action derives; and

Stipulation as to Removal

(3) The caption of the removed case after this substitution now reads:

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DIGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, Inc.,

Defendant & Third-Party Plaintiffs,

against

UNITED STATES OF AMERICA and ROBERT SHERIDAN,

Third-Party Defendants.

---

and;

(4) The action is designated as a jury action except as to the United States of America; and

(b) The United States of America's Motion to amend its answer is withdrawn without prejudice.

Dated: Brooklyn, New York
September 20, 1973

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for United States of America
and Third Party Defendant Robert
Sheridan

225 Cadman Plaza East
Brooklyn, New York 11201
By: GEORGE H. WELLER
Assistant U. S. Attorney

Stipulation as to Removal

O'LEARY AND O'LEARY
Attorneys for Plaintiff Robert Sheridan
88-14 Sutphin Boulevard
Jamaica, New York 11435
By: s/ STEPHEN W. O'LEARY
A member of the firm

LARKIN, WRENN, & CUMISKY
Attorneys for Defendants and Third-Party Plaintiffs
11 Park Place
New York, New York 10007
By: s/ JOHN J. WRENN
A member of the firm

Dated: Brooklyn, New York
October 10, 1973

/s/ ANTHONY J. TRAVIA
United States District Judge
Eastern District of New York

Answer of Defendant, United States of America to Third-Party Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendant, United States of America, answering the third-party complaint by its attorney, Robert A. Morse, United States Attorney for the Eastern District of New York, respectfully shows to the Court and alleges:

1. Denies knowledge or information sufficient to form a belief as to each and every allegation of paragraphs First and Second of the complaint.

2. Denies each and every allegation of paragraphs Fifth, Sixth, Seventh and Eighth.

3. Denies the allegation of paragraph Ninth that Robert Cooper is a third party defendant, and admits the other allegations of said paragraph.

4. Denies the allegations of paragraph Eleventh, except admit that the two vehicles were in contact on the day in question.

5. Denies each and every allegation of paragraphs Twelfth, Thirteenth, Fifteenth and Sixteenth of the complaint.

AS AND FOR A COMPLETE, SEPARATE AND AFFIRMATIVE DEFENSE

6. The accident in question was caused solely and completely by the negligence, carelessness and failure to exercise due care and caution on the part of the Defendants and Third Party Plaintiffs, and their agents, servants and employees, and was in no way caused or con-

tributed to by the defendant, United States of America, or its agents, servants and employees.

WHEREFORE, the third party defendant, United States of America, demands judgment dismissing the third party complaint, together with the costs and disbursements of this action.

ROBERT A. MORSE
United States Attorney
Attorney for the Third Party Defendant
By: s/ LLOYD H. BAKER
Assistant U. S. Attorney

To:

Larkin, Wrenn and Cumisky
Attorneys for Defendants,
Third Party Plaintiffs
11 Park Place
New York, N. Y. 10007

O'Leary and O'Leary, Esqs.
Attorneys for Plaintiff,
Robert Sheridan
88-14 Sutphin Blvd.
Jamaica, N. Y. 11435

General Rule (E.D.N.Y.) 9(g) Statement.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED.

There is no genuine issue as to the following material facts.

At all times pertinent to this case:

1. Robert Cooper was an employee of the United States.

2. Robert Sheridan was an employee of the United States.

3. Robert Cooper was operating a motor vehicle.

4. The motor vehicle being operated by Robert Cooper was a United States government motor vehicle.

5. Robert Cooper was acting within the scope of his employment.

6. Robert Sheridan was acting within the scope of his employment.

7. Robert Sheridan had no control over Robert Cooper.

8. Robert Sheridan had no control over the government motor vehicle.

9. Robert Sheridan was not Robert Cooper's supervisor.

10. Robert Sheridan had no supervisory power over Robert Cooper.

General Rule (E.D.N.Y.) 9(g) Statement

11. Robert Sheridan had no voice in fixing the route of the government motor vehicle.

12. Robert Sheridan had no voice in changing the route of the government vehicle.

13. All expenses of the use of the government vehicle were borne by the government.

14. Robert Sheridan did not pay any share of the automobile trip.

15. Robert Cooper did not pay any share of the automobile trip.

16. Robert Cooper and Robert Sheridan were not engaged in a joint venture.

Dated: Brooklyn, New York
November 9, 1973.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for United States and federal defendant Robert Sheridan
225 Cadman Plaza East
Brooklyn, New York 11201
(212) 596-5700
By: GEORGE H. WELLER
Assistant United States Attorney

Notice of Motion by United States to Serve an Amended Answer, Partial Summary Judgment, etc.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Please Take Notice that the United States will move the Court to be held at Courtroom Number 9, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, on the 14th day of December, 1973, at 10:00 A. M., before the Honorable Anthony J. Travia, United States District Judge, or as soon thereafter as counsel can be heard, for

an order under F. R. Civ. P. 15(a) for leave of third party defendant United States of America to amend its answer; and for

partial summary judgment under F. R. Civ. P. 56 on the basis that there is no genuine issue as to the facts listed on the attached General Rule (E.D.N.Y.) 9(g) statement, and the government is entitled to a judgment in its favor on these points as a matter of law; and for

an order to dismiss Robert Sheridan as a Third-Party defendant for either of the following reasons:

> Robert Sheridan was not engaged in a joint venture with, nor the supervisor of, nor in control of Robert Cooper, the operator of the government vehicle, as alleged by the third-party plaintiffs,
>
> or
>
> the third-party plaintiffs seek contribution or indemnity for damages for personal injury resulting

from the operation of a motor vehicle, allegedly caused by the negligent act or omission of Robert Sheridan, an employee of the Government while acting within the scope of his employment, and 28 U. S. C. §2679(a) makes exclusive the remedy against the United States provided by 28 U. S. C. §1345(b); and for

an order amending the caption to read:

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DiGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, Inc.,

Defendants and Third-Party Plaintiffs,

against

UNITED STATES OF AMERICA,

Third-Party Defendant.

Notice of Motion by United States to Serve an Amended Answer, Partial Summary Judgment, etc.

and for,

such other and further relief as to this Court may consider just and proper.

Dated: Brooklyn, New York
November 9, 1973

Yours, etc.,

ROBERT A. MORSE
United States Attorney
Eastern District of New York Counsel for United States and third-party federal defendant Robert Sheridan
225 Cadman Plaza East
Brooklyn, New York 11201
(212) 596-5700
By: GEORGE H. WELLER
Assistant United States Attorney

To:

Larken, Wrenn and Cumisky
11 Park Place
New York, New York 10007

O'Leary and O'Leary, Esqs.
88-14 Sutphin Boulevard
Jamaica, New York 11435

Affidavit of John J. Wrenn in Opposition to Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

JOHN J. WRENN, being duly sworn, deposes and says:

That he is a member of the firm of Larkin, Wrenn and Cumisky, Esqs., attorneys for the defendants and third-party plaintiffs herein.

That this affidavit is in opposition to the motion of the third-party defendant, United States of America, which seeks an order:

a. amending its answer to interpose affirmative defenses;

b. granting summary judgment; and

c. dismissing the action as to Robert Sheridan as a third-party defendant.

That this case concerns itself with a cause of action by the plaintiff Robert Sheridan wherein he claims that on Wednesday, December 22, 1971 at or about 10:30 a.m., he was a passenger in an automobile operated by Robert Cooper and owned by the United States Government when it was involved in an accident on the Long Island Expressway.

The plaintiff was involved in an accident with a vehicle owned by LPI Transportation Corp. and operated by Gaspare DiGiorgio.

That issue was joined in the main action by service of an answer in the Supreme Court, Kings County, on July 19, 1972.

Affidavit of John J. Wrenn in Opposition to Motion

The third-party action was commenced against government employees. The act the government refers to speaks of "exclusive liability of the United States"; it is silent as to the liability of government employees.

That a third-party action was commenced by the service of a third-party summons and complaint on Robert Cooper on September 26, 1972. That Robert Sheridan was served with a third-party summons and complaint on October 5, 1972. That a copy of a Petition for Removal was received on January 3, 1973.

That the United States, two years after the accident, seeks leave to amend its answer to interpose affirmative defenses. That the Court's attention is directed to the fact that no reason is given for the unreasonable delay in seeking leave to amend and as is obvious, if leave were granted at this late date, this would work a substantial prejudice on the defendant.

The Court's attention is directed to the fact that a prior motion was made on August 2, 1973 and withdrawn. The prior motion essentially interposed a defense based upon the Federal Compensation Act, in addition to which another defense was interposed wherein it was alleged that a notice of claim against the United States was not filed and the suit was therefore barred.

That aside from the fact that (1) no reason is given for the unreasonable delay; and (2) that no new facts are alleged to have developed, it is respectfully submitted that the amendment, in addition to being prejudicial, has no merit. Based upon the above, the third-party defendant has waived or in any event should be estopped to make any claim with regard to a defense of compensation. Apparently, the third-party defendant has waived its claim as to the failure to file a notice of claim.

The first defense is inadequate and the third-party defendant should be required to state in what respect the third-party complaint fails to state a cause of action.

The substantive law of New York would govern this litigation as between the parties. The law in New York is clear as set forth in the case of *Dole v. Dow Chemical Company,* 30 N. Y. 2d 143.

The *Dole* case gives the defendant an independent right to contribution. This defendant asserts its own right of recovery for breach of an independent duty owed to it by the third-party defendants. An analysis of the right in the *Dole* case indicates that it is a right of a special kind, an independent obligation owed by one joint tortfeasor to another. This defendant is now exposed to a judgment for damages which may exceed the amount which they should fairly be required to pay. The right to recover against the third-party defendants is not a right based upon injuries suffered by the plaintiff but rather a right based on an obligation of the third-party defendants to this defendant because of the third-party defendant's conduct.

Since this defendant was not the plaintiff's employer, it could not plead the exclusive remedy of compensation as a defense to the main action. New York gives one defendant an independent right against the other which is not derivative in any way and does not inure to the benefit of the plaintiff in any way and does not increase or diminish the plaintiff's recovery.

In the event the accident was substantially caused by Cooper and no contribution was allowed, the United States could still enforce its right of subrogation thereby allowing the United States to profit from its own wrongdoing.

The Government also seeks an order for partial summary judgment indicating that there is no issue as to the 16 items set forth in the statement dated November 9, 1973 and submitted with the motion papers. That it is respectfully submitted that there are issues as to the vast majority of the cases of the alleged facts.

There is no issue, however, as to Nos. 1, 2, 3 and 4.

The other numbered items cannot be resolved as a matter of law and the mere fact that bulletins were issued by the third-party defendant does not make it so.

Aside from the merits the United States Government does not represent Robert Sheridan and, therefore, has no standing to make a motion on his behalf. Whether or not Robert Sheridan exercised any supervision or control over the operator of the car cannot be resolved as a matter of law.

WHEREFORE, your deponent respectfully requests that the within motion be denied and for such other and further relief as this Court deems just and proper.

(Sworn to by John J. Wrenn, January 8, 1974.)

Order Dismissing Action as to Third Party Defendant, Robert Sheridan, Granting Government's Motion on Leave to Serve an Amended Third Party Answer and Denying Government's Motion for Partial Summary Judgment.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The United States of America having moved this Court

1. to dismiss Robert Sheridan as a third party defendant, for the reason that the defendants-third party plaintiffs seek indemnification from Robert Sheridan "for the amount of any verdict or judgment, or portion thereof which may be obtained herein by the plaintiff against these defendants" for personal injury resulting from the allegedly negligent constructive operation of a government motor vehicle while government employee Robert Sheridan was acting within the scope of his employment with the United States Food and Drug Administration, Department of Health, Education, and Welfare; and

2. for leave to file an amended third party defendant's answer; and

3. for partial summary judgment; and

the United States having submitted a memorandum of law and the statement required by General Rule (E.D.N.Y.) 9(g), and

defendants-third party plaintiffs having submitted an affidavit and memorandum of law in opposition, and plaintiff not having responded or appeared, and oral argument having been heard on January 11, 1974; the Court being fully advised in the premises, now it is

Order Dismissing Action as to Third Party Defendant, etc.

ORDERED that the third party action be and is hereby dismissed as against third party defendant Robert Sheridan; and it is

ORDERED, that third party defendant United States of America is given leave to serve and file an amended third party answer; and it is further

ORDERED, that the motion of third party defendant United States of America for partial summary judgment is denied.

Dated: Brooklyn, New York
January 18, 1974

/s/ ANTHONY J. TRAVIA
United States District Judge

Amended Third-Party Defendant's Answer.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DiGIORGIO, LPI TRANSPORT CORP., and PEPSI-COLA, INC.,

Defendants and Third Party Plaintiffs,

against

UNITED STATES OF AMERICA,

Third Party Defendant.

Third-Party defendant, United States of America, as to the averments upon which third-party plaintiffs rely:

1. Admits paragraphs "First", "Second", "Third", "Fourth", "Tenth", "Eleventh" and "Fourteenth".

2. Denies paragraphs "Fifth", "Sixth", "Seventh", "Eighth", "Twelfth", "Thirteenth", "Fifteenth" and "Sixteenth".

3. In paragraph "Ninth",

denies Robert Sheridan is a third-party defendant,

denies Robert Sheridan was a "passenger" in the Rambler motor vehicle, but admits that Robert Sheridan was riding in the Rambler motor vehicle,

denies that the registration number of the motor vehicle was GF 1144601, but admits that the federal license plate number of the motor vehicle was G11 43601; and

admits the remainder of the paragraph.

Amended Third-Party Defendant's Answer

FIRST DEFENSE

4. The third-party complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

5. The accident was caused solely and completely by the lack of due care and diligence and the negligence and carelessness of the defendants and third-party plaintiffs, and their officers, agents, servants and employees, and in no way was caused or contributed to by the United States of America, its officers, agents, servants or employees.

THIRD DEFENSE

6. The third-party complaint fails to state a complaint upon which relief can be granted as the exclusive liability of the United States of America is under the Federal Employees Compensation Act, 5 U. S. C. §8116 (c).

WHEREFORE, the third-party defendant, United States of America, demands judgment dismissing the third-party complaint, together with the costs and disbursements of this action.

Dated: Brooklyn, New York
January 28, 1974

EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York
Attorney for United States of America
225 Cadman Plaza East
Brooklyn, New York 11201
(212)-596-5700
By: GEORGE H. WELLER
Assistant United States Attorney

Notice of Motion to Dismiss Third Defense Contained in Amended Answer and for Partial Summary Judgment.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Please Take Notice, that upon the affidavit of John J. Wrenn, sworn to the 1st day of February, 1974, the third party defendant's amended answer, and upon all of the pleadings and proceedings heretofore had herein, a motion pursuant to Rules 12(f) and 56 of the Federal Rules of Civil Procedure will be made before Judge Anthony J. Travia, in Courtroom 9 of this Court, to be held at the Courthouse thereof located at 225 Cadman Plaza East, Brooklyn, New York, on the 28th day of February, 1974, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order:

1. Dismissing the third defense contained in the amended answer; and

2. Granting partial summary judgment in favor of the defendants and third party plaintiffs with regard to the third affirmative defense upon the ground that there is no genuine issue of material fact and that the defendant

Notice of Motion to Dismiss Third Defense Contained in Amended Answer and for Partial Summary Judgment

is entitled to partial summary judgment as a matter of law.

Dated: New York, New York
February 1, 1974

Yours, etc.,

LARKIN, WRENN AND CUMISKY
By /s/ JOHN J. WRENN
Attorneys for Defendants and Third Party Plaintiffs
Office & P. O. Address
11 Park Place
New York, New York 10007

To:

O'Leary & O'Leary
Attorneys for Plaintiff
88-14 Sutphin Boulevard
Jamaica, New York 11435

Edward John Boyd V
United States Attorney
Eastern District of New York
Attorney for Third Party Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

Affidavit of John J. Wrenn in Support of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

JOHN J. WRENN, being duly sworn, deposes and says:

That he is a member of the firm of Larkin, Wrenn and Cumisky, attorneys for the defendants and third party plaintiffs herein.

That this affidavit is submitted in support of the within motion to dismiss the third affirmative defense and granting partial summary judgment with regard to said defense.

That this is a cause of action for personal injuries allegedly sustained by the plaintiff while an employee of the United States in a car owned by the United States and operated by a co-employee while on the business of the United States.

That due to the fact that the plaintiff was an employee of the United States, he commenced an action against the other motor vehicle involved in the accident and did not sue the Federal Government.

That this defendant impleaded the plaintiff and the driver of the Government car and the United States was substituted for them as third party defendant.

After motion, the Court allowed the United States to interpose an affirmative defense wherein they claim that the third party complaint fails to state a cause of action in that the exclusive liability of the United States is under the Federal Compensation Act.

That under the law of New York, the Compensation Act is not a defense to an employer third party defendant. That under the New York law and the Federal

cases submitted in the Memorandum filed herewith, the Compensation Act has not been deemed a defense to a third party defendant who has not been sued directly by the plaintiff.

That as the Court can see, the cases are well settled that a defendant and third party plaintiff may implead someone whom the plantiff could not sue directly. There is ample precedent for this in the maritime field as well as under local decisions.

It is this defendant and third party plaintiff's claim that the underlying accident was caused substantially through the negligence of the operation of the Government's car. The underlying purpose of indemnity is to relieve the relatively innocent wrongdoer and shift the burden to one whose conduct is more blameworthy. That it hardly seems fair to allow the Government to recoup whatever compensation payments they may have made and in addition to which, allow them to escape their burden of liability with regard to the underlying accident assuming for the moment that their conduct was a substantial factor in bringing about this accident.

The third party complaint seeks indemnity from the Government on the theory of apportionment of liability. In other words, the defendant's right to contribution or full indemnity is not dependent in any way or derivative of any claim by the plaintiff. This is an independent special right the defendant has to recover from a wrongdoer all or a proportionate share based upon a determination of proportioned liability.

That it is respectfully submitted that this matter may be handled as a matter of law and the sole question being whether or not compensation is a good defense to a third party defendant who is not a party to the main action and where there is no derivative liability to the plaintiff, directly or indirectly.

Notice of Motion for Preliminary Hearing Under Rule 12(d)

That it would be in the best interests of all parties if the third affirmative defense were disposed of at this time so that all parties would know exactly where they stand and in the event said defense in the amended answer were dismissed, in all probability the matter could be resolved with regard to the plaintiff.

WHEREFORE, your deponent respectfully requests that the within motion be granted, and for such other and further relief as this Court deems just and proper.

(Sworn to by John J. Wrenn, February 1, 1974.)

Notice of Motion for Preliminary Hearing Under Rule 12(d).

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Please Take Notice that at 10:00 A.M. EDT on Friday, March 8, 1974, in Courtroom Number 9, Sixth Floor, Federal Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, third party defendant United States of America will move this Court, Honorable Anthony J. Travia, presiding, under Rule 12(d), Federal Rules of Civil Procedure, to hear and determine the Third Defense pleaded in third party defendant's amended answer, and to dismiss the third party action with costs to the third party defendant, on the ground that the is-

sue raised by this defense may be determined separately from the other issues in the case and that if this issue is decided in the third party defendant's favor, the third party action should be dismissed.

Dated: Brooklyn, New York
February 5, 1974

Yours, etc.,

EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York
Attorney for United States of America
225 Cadman Plaza East
Brooklyn, New York 11201
By: GEORGE H. WELLER
Assistant United States Attorney

To:

O'Leary and O'Leary, Esqs.
Attorneys for Plaintiff
88-14 Sutphin Boulevard
Jamaica, New York 11435

Larkin, Wrenn & Cumisky, Esqs.
Attorneys for Defendants and Third-Party Plaintiffs
11 Park Place
New York, New York 10007

Decision and Order by Travia, D. J., Dated March 26, 1974.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

March 26, 1974

TRAVIA, D. J.:

The instant action arose out of an automobile accident occurring in Queens, New York on December 21, 1971. The plaintiff, Robert Sheridan, was a passenger in a government owned vehicle, being driven by Robert Cooper. Both Sheridan and Cooper were federal employees working for the Food and Drug Administration. The other vehicle involved in the collision was owned by LPI Transport Corporation and was being operated by Gasper DiGiorgio in the business of Pepsi-Cola, Incorporated.

Sheridan commenced a personal injury action against DiGiorgio, LPI Transport and Pepsi-Cola in the Supreme Court of the State of New York, Kings County. The defendants in turn brought a third-party action against both Sheridan and Cooper, seeking a *Dole v. Dow* apportionment of damages.[1] On December 29, 1972, the United States Attorney, pursuant to the provisions of Title 28 U.S.C. §2679, certified that the third-party defendant, Cooper, was acting within the scope of his empoyment as an employee of the United States at the time of the accident. Accordingly, the entire action was removed to this court and the United States of America

[1]See *Dole v. Dow Chemical Co.*, 30 N. Y. 2d 143, 331 N. Y. S. 2d 382, 282 N. E. 2d 288 (1972).

was substituted as a third-party defendant in the place of Cooper.[2]

On November 9, 1973 a similar certification was made by the United States Attorney with respect to Sheridan. Accordingly, on January 8, 1974, this court issued an order upon motion dismissing Sheridan as a third-party defendant. *See* Title 28 U.S.C. §2679(b). On that same date, this court granted the United States leave to amend its third-party answer, but denied the Government's motion for partial summary judgment.

Thereafter, the Government made application, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, to dismiss the third-party action based upon the third affirmative defense of its amended third-party answer, to wit:

> "The third-party claimant fails to state a complaint upon which relief can be granted as the exclusive liability of the United States of America is under the Federal Employees Compensation Act, 5 U.S.C. §8116(c)."

---

[2]Title 28 U. S. C. §2679(d) provides in salient part:

> "Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto."

Authority has been delegated by the Attorney General to the several United States Attorneys, under 28 C.F.R. §15.3, to make the necessary certification.

Decision and Order by Travia, D. J., Dated March 26, 1974

The third-party plaintiffs then filed a cross-motion, under Rules 12(f) and 56 of the Federal Rules of Civil Procedure, requesting that this court grant partial summary judgment dismissing the Government's third affirmative defense.

The legal issue presented to this court for resolution is whether a cause of action for indemnity or contribution exists against the United States, as a third-party defendant, where the injured plaintiff is a government employee. It is well established that a federal employee is precluded from suing the United States for injuries sustained during the course of his employment and that his avenue of redress is strictly confined to the stated benefits set up under the Federal Employees Compensation Act (hereinafter referred to as "FECA"). *See Grenade v. United States*, 356 F. 2d 837 (2d Cir. 1966), *cert. denied*, 385 U. S. 1012 (1967). Stated in a different manner, the question now posed is whether or not the exclusivity section of FECA[3] can be legitimately extended to revoke the consent of the United States to be sued for contribution or indemnity under the Federal Tort Claims Act.

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[3]The exclusivity section of FECA is found in Title 5 U.S.C. §8116(c), which reads:

> "The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute."

Decision and Order by Travia, D. J., Dated March 26, 1974

The third-party plaintiffs maintain that the determination of this issue should be governed by the local law of the state where the injury occurred, namely, New York. In support of this contention, the third-party plaintiffs rely chiefly upon the United States Supreme Court's decision in *United States v. Yellow Cab Co.*, 340 U. S. 543 (1951). The *Yellow Cab* case, however, is not controlling in this particular context. That case involved an injured plaintiff who was not a federal employee. Consequently, the court never dealt with the impact of FECA upon actions brought under the Federal Tort Claims Act, which is the central issue now confronting this court. *See Busey v. Washington*, 225 F. Supp. 416, 421 (D.D.C. 1964). Moreover, the Government's immunity from suit under FECA is federally created and the dimensions of that exemption must be measured by federal rather than state standards. *See Newport Air Park, Inc. v. United States*, 419 F. 2d 342, 346-347 (1st Cir. 1969); 12 ALR Fed 616, 620 n. 7.

A review of the applicable federal case law, reveals an obvious conflict of authority among the various circuits on the question. *See* 12 ALR Fed. 616. The third-party plaintiffs urge this court to adopt the reasoning employed in *Wallenuis Bremen G.m.b.H. v. United States*, 409 F. 2d 994 (4th Cir. 1969), *cert. denied*, 398 U. S. 958 (1970) and *Travellers Ins. Co. v. United States*, 331 F. Supp. 189 (E.D. Pa. 1971).[1] These cases are, however,

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[1] *Wallenius Bremen* involved an indemnity action by a shipowner against the United States after the former had settled a claim brought by a Department of Agriculture inspector, who had fallen from a ladder while aboard the shipowner's vessel. The court in analyzing FECA's exclusivity provision, employed the *ejusdem generis* rule and construed the language "anyone otherwise entitled" to mean those individuals personally related to the federal employee. The court interpreted the phrase so as not to exclude strangers from suing the Government. This same reasoning was also employed in the *Travellers* case.

representative of what might be termed a "minority viewpoint" and this court believes that the "majority approach" is far more persuasive.

Illustrative of the majority stance is *Busey v. Washington, supra,* wherein a mail carrier was injured while riding in a mail truck which struck a protruding piece of angle iron on a salvage truck. The plaintiff, who had collected FECA benefits, subsequently brought an action against the owner and operator of the salvage truck. The defendants, seeking contribution, impleaded the United States and the postal truck driver. The court held that the exclusive remedy provision of FECA prohibited third-party suits by one joint tortfeasor against the United States, as an alleged joint tortfeasor, for contribution when the injured party was a federal employee. After exploring the legislative history of the exclusivity provision of FECA, the court found that:

> "[T]he purpose of Workmen's Compensation Statutes such as the one herein involved, is not only to provide for employees 'a remedy which is both expeditious and independent of proof of fault, *but also for employers a liability which is limited and determinate.*' To permit contribution against the United States would not be in keeping with this purpose, inasmuch as the liability of the employer, the United States in this case, would cease to be limited and determine." *Id.* at 423. (Italics in original).

A third-party action cannot be used as a vehicle to circumvent the statutory intent of limiting the Government's liability to the amount scheduled under FECA. If the rule were otherwise, the Government's immunity would be illusory, evaporating the instant that another wrongdoer could be found and brought in as a defend-

ant. Thus, the United States would be forced to pay an amount in excess of its statutory obligation to the injured employee, albeit indirectly through a third-party plaintiff.

Another convincing rationale compelling the dismissal of the third-party suit here springs from the very nature of an action for contribution. Contribution was designed to obviate the inequity of permitting an injured plaintiff to select by whim or caprice a single defendant, from among several common joint tortfeasors, to shoulder the entire burden of liability. This danger is no longer present, however, where one of two joint tortfeasors is immune from suit. As Judge Coffin pointed out in his concurring opinion in *Newport Air Park, Inc. v. United States, supra*, 419 F. 2d at 347 (1st Cir. 1969):

> "In the case where one of the tortfeasors is immune from suit by the injured party—our case—the rationale behind contribution no longer exists, for there is no possibility of the arbitrary, fortuitous, or collusive choice of defendants which underlies contribution. That the government should go 'scot free' may be somewhat unfair, but the unfairness stems not from the law of contribution but from the fact that the government is given immunity under section 8116(c) in exchange for strict liability for specified benefits for all injuries of its covered employees."

Therefore, the reason underlying the need for contribution is undercut in situations such as the one presented herein, where there is no liability on the part of the indemnitor to the injured party. In a sense, the Government can no longer be considered as a joint tortfeasor within the meaning of the Federal Tort Claims

Act.[5] *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379 (9th Cir.), *cert. denied, United Air Lines, Inc. v. United States*, 379 U. S. 951 (1964); *accord, Wien Alaska Airlines, Inc. v. United States*, 375 F. 2d 736 (9th Cir.), *cert. denied*, 389 U. S. 940 (1967); *see Madux v. Cox*, 382 F. 2d 119 (8th Cir. 1967); *Scarbrough v. Murrow Transfer Co.*, 277 F. Supp. 92 (E. D. Tenn. 1967); *but compare Murray v. United States*, 405 F. 2d 1361 (D. C. Cir. 1968), which agrees with the proposition within the context of contribution actions, but questions the use of the same rationale in indemnity suits.

In *Newport Air Park, Inc. v. United States, supra*, a suit arose out of an aircraft collision which was caused by the joint negligence of both Newport and the Government. The widow of a federal employee killed in the crash collected $8,600 in FECA benefits and subsequently recovered an additional $50,000 from Newport in settlement of her claim. Although the widow repaid the Government the FECA award,[6] the court still dismissed Newport's contribution claim against the United States. The court opined that:

> "Looking at the question as one of federal law, we hold that contribution cannot be had from the government when the government was under no tort liability to the injured party. Even when the person obliged to pay was only secondarily liable,

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[5] As the court articulated in *Newport Air Park, Inc., v. United States, supra*, 419 F. 2d at 346:

> "As a matter of legal principle the route to contribution must be via subrogation or assignment based upon payment. In such circumstances we would suppose that there would be nothing to be subrogated to if the other party claimed to be a joint tort-feasor, was never under liability to the injured party." (Footnotes omitted.)

[6] *See* Title 5 U.S.C. §8132.

> and hence entitled to full indemnity, it has been held that no right arises against the primary actor if, as the employer, he was statutorily immune from tort liability." *Id. at* 347.

The Supreme Court's decisions in *Weyerhaeuser S. S. Co. v. United States*, 372 U. S. 597 (1963) and *Treadwell Const. Co. v. United States*, 372 U. S. 772 (1963), *reversing Drake v. Treadwell Const. Co.*, 299 F. 2d 789 (3d Cir. 1962), are distinguishable from the present action in that both cases involved a legal relationship between the wrongdoers which existed independently of the accident causing the injury to the plaintiff. In *Weyerhaeuser* the Court's determination to permit contribution was predicated upon the long honored rule in admiralty actions of dividing damages in mutual fault collisions, which was held to be preeminent over the provisions in FECA. Similarly, in the *Treadwell* case there was an underlying contractual agreement existing between the United States and the contractor, who had manufactured the steel tank which exploded and caused the plaintiff's injuries.[3] *See Panico v. Whiting Milk Co.*, 335 F. Supp. 315, 317 (D. Mass. 1971). By contrast, the nexus existing between the third-party plaintiffs and the Government here arises solely from the circumstances of the accident itself. There are no other connections between the parties which might provide the necessary linkage to establish an independent duty or

[3]It is noteworthy that the court in *Busey v. Washington*, *supra*, 225 F. Supp. at 421, found that the reversal in the *Treadwell* case was not a Supreme Court mandate to extend the boundaries of *Weyerhaeuser* beyond the narrow confines of admiralty collision cases. The *Busey* court thought it significant that the Supreme Court did not reverse the Third Circuit Court of Appeals with orders to reinstate the district court's ruling permitting contribution, but rather remanded the case to the district court to reconsider the case in light of *Weyerhaeuser*.

relationship. *See Slattery v. Marra Bros.*, 186 F. 2d 134, 138-139 (2d Cir. 1951), *cited in Panico v. Whiting Milk Co., supra,* 335 F. Supp. at 317 and *Murray v. United States, supra,* 405 F. 2d at 1367.

A cryptic indication of the Second Circuit's inclination to adopt the "majority approach" can be discerned from *Schwartz v. Compagnie General Transatlantique,* 285 F. Supp. 473 (S.D.N.Y.), *aff'd* 405 F. 2d 270 (2d Cir. 1968). In that case, a United States immigrant inspector was injured while engaged in official business aboard the defendant's vessel. In a suit by the inspector against the shipowner, the latter sought to implead the United States for indemnity based upon an alleged breach of an implied warranty of workmanlike performance. The court dismissed the third-party action, finding that no contract existed between the litigants and that no warranty could be implied between them. Although the court did not discuss the exclusivity provision of FECA, the court did cite *United Air Lines v. Wiener, supra,* [5] and it concluded that the claim over must be dismissed because there was no underlying tort liability on the part of the Government to the injured inspector. *Id.* at 474.

Accordingly, it is

ORDERED that the third-party plaintiffs' application for partial summary judgment dismissing the third affirma-

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[5] The *United Air Lines* case involved a midair collision of a commercial and a military airplane. In a suit brought by the estates of seven nonmilitary federal employees who were killed in the crash, the court held that the Air Lines was barred from suing the United States for indemnity. The basis for the decision was grounded upon the removal of the Government's tort liability under FECA. The court reasoned that any claim for contribution or indemnity in a noncontractual situation was confined to situations wherein the indemnitor was liable in tort to the injured plaintiff.

tive defense of the third-party defendant's amended answer be and the same is hereby denied; and it is further

ORDERED that the third-party defendant's application for an order dismissing the third-party action be and the same is hereby granted.

s/ ANTHONY J. TRAVIA
U. S. D. J.

Notice of Motion to Amend Decision by Travia, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Please Take Notice, that upon the affidavit of John J. Wrenn, sworn to the 5th day of April, 1974, upon the Decision and Order dated March 26, 1974, and upon all of the pleadings and proceedings heretofore had herein, a motion will be made before Judge Anthony J. Travia in Courtroom 9 of this Court, to be held at the Courthouse located at 225 Cadman Plaza East, Brooklyn, New York, on the 19th day of April, 1974, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order:

1. Amending the Decision and Order of Judge Travia dated March 26, 1974, and

Notice of Motion to Amend Decision by Travia, D. J.

2. For such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 5, 1974

Yours, etc.,

LARKIN, WRENN AND CUMISKY
By JOHN J. WRENN
Attorneys for Defendants and Third Party Plaintiffs
Office & P. O. Address
11 Park Place
New York, New York 10007

To:

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Attorneys for Plaintiff
88-14 Sutphin Boulevard
Jamaica, New York 11435

Edward John Boyd V
U. S. Attorney, Eastern District
Attorney for 3rd Party Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

Affidavit of John J. Wrenn in Support of Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

JOHN J. WRENN, being duly sworn, deposes and says:

That he is a member of the firm of Larkin, Wrenn and Cumisky, attorneys for the defendants and third party plaintiffs herein.

That this affidavit is submitted in support of the within motion to amend the last paragraph of the Decision and Order of Judge Travia dated March 26, 1974. That the last paragraph reads as follows:

> "ORDERED, that the third party defendant's application for an order dismissing the third party action be and the same is hereby granted."

That it is respectfully requested that the Court grant an order conforming to Rule 54 (b) of the Federal Rules of Civil Procedure and that the said Order be amended to read as follows:

> "ORDERED, that the third party defendant's application for an order dismissing the third party action be and the same is hereby granted, and that the Clerk of this Court enter a final judgment upon the order herein dismissing the third party action and that the undersigned expressly determines that there is no just reason for delay in hearing the appeal upon the entry of final judgment on this order."

That the Court is completely familiar with this matter, having recently written a 12 page decision which essen-

tially turns upon the validity of the affirmative defense of the United States of America as to whether a cause of action for indemnity or contribution exists against the United States as a third party defendant where the injured plaintiff is a government employee.

As the Court indicated in its decision, a review of the federal case law reveals an obvious conflict of authority among the various circuits on this question.

That it is respectfully submitted that there is no clear determination in this circuit as to which view this circuit will adopt.

That it is respectfully submitted that this is a substantial issue and in the event an appeal is taken, it is respectfully submitted that a determination of the appeal may materially advance the termination of the litigation.

That there is a question in your deponent's mind as to whether or not the Decision and Order of the Court dated March 26, 1974 and entered on March 27, 1974, can be the subject matter of an appeal.

In order to obviate a later difficulty, it is your deponent's intention, in the event the Court grants the within motion, to petition the Second Circuit for leave to appeal under Section 1292 (b) of Title 28 of the United States Code.

That in the event this Court does grant the within motion, your deponent will move with all due haste to petition and in the event the petition is granted, to perfect the appeal in the Second Circuit as expeditiously as possible so that there will not be any undue delay so as to interfere with any of the rights of the parties or delay justice in any respect.

It would seem not to be in the best interest of all parties to continue with this matter and try the personal injury action and at that point take the entire matter up for review. In the event the issue as to the propriety of the third party action is finalized, each party will know

exactly what their rights are and there appears to be no reason why the litigation would not be terminated at that juncture.

WHEREFORE, your deponent respectfully requests that the within motion be granted and for such other and further relief as this Court may deem just and proper.

(Sworn to by John J. Wrenn, April 5, 1974.)

Rule 54(b) Certificate.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

By Decision and Order filed March 26, 1974, the Court

> "ORDERED that the third-party defendant's application for an order dismissing the third-party action be and the same is hereby granted."

Under Rule 54(b) of the Federal Rules of Civil Procedure it is

> (1) EXPRESSLY DETERMINED that there is no just reason for delay; and it is expressly
>
> (2) DIRECTED that a final judgment be entered.

Dated: Brooklyn, New York
April 24, 1974

/s/ ANTHONY J. TRAVIA
United States District Judge

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This action came on for a hearing before the Court, the Honorable Anthony J. Travia, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered that the third-party defendant's application for an order dismissing the third-party action be granted and the court having expressly determined that there is no just reason for delay and expressly directed that final judgment be entered, it is

ORDERED and ADJUDGED that the third-party defendant's application for an order dismissing the third-party action be and the same is hereby granted.

Dated: Brooklyn, New York
April 26, 1974

LEWIS ORGEL
Clerk

Notice of Appeal of Defendants and Third-Party Plaintiffs.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Please Take Notice, that the defendants and third-party plaintiffs, Gaspare DiGiorgio, LPI Transport Corp. and Pepsi-Cola, Inc., hereby appeal to the United States Court of Appeals for the Second Circuit from a Judgment entered in the office of the Clerk of this Court on Appeal 26, 1974, which ordered and adjudged that the third-party defendant's application for an order dismissing the third party action be granted. Said defendants and third-party plaintiffs appeal from each and every part of said Judgment insofar as it is in favor of the third-party defendant and against the defendants and third-party plaintiffs.

Dated: New York, New York
May 6, 1974

Yours, etc.,

LARKIN, WRENN AND CUMISKY
By /s/ JOHN J. WRENN (A Member of the Firm)
Attorneys for Defendants and Third-Party Plaintiffs
Office & P. O. Address
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New York, New York 10007

Notice of Appeal of Defendants and Third-Party Plaintiffs

To:

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225 Cadman Plaza East
Brooklyn, New York 11201

Services of three (3) copies of
the within is
hereby admitted this day
of , 197

Attorney for